LE COPY

72-53

FILED
JUL 8 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

MICHAEL EDWARD FRANCIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RUDOLPH SCHWARE
5701 East Evans Avenue
Denver, Colorado 80222
(303) 757-5641

Of Counsel:

GUY T. SAPERSTEIN
2201 Fruitvale Avenue
Oakland, California 94601
(415) 532-6645

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement of the case	3
Reasons for granting the writ . . .	4
I. The Decision Below is in Conflict with the Recent Decision of This Court in Clay v. United States, 403 U.S. 698 (1971), And With Decisions of Other Circuit Courts of Appeal	9
II. Under Public Law 92-129, 22(b)(4), September 28, 1971, the Issue of the Propriety of Reasons Given by Local Boards to Justify Their Actions is Likely to Arise Frequently	13

Conclusion 15

Appendix (Opinion and Judgement of Court of Appeals) . . . . . .

CITATIONS

Cases: Bates v. Commander, 413 F.2d 475 (1st Cir. 1969) 8

Bohnert v. Faulkner, 438 F.2d 747 (6th Cir. 1971) 7

Capobianco v. Laird, 424 F.2d 1304 (2d Cir. 1970) 8

Clay v. United States, 403 U.S. 698 (1971) 4

Robertson v. United States, 404 F.2d 1141 (5th Cir. 1968) 9

Sicurella v. United States, 348 U.S. 385 (1955) 5

United States v. Abbott, 425 F.2d 910 (8th Cir. 1970)

United States v. Andrews, 446 F.2d 1086 (10th Cir. 1971) 13

United States v. Broyles, 423 F.2d 299 (4th Cir. 1970) 7

United States v. Carroll, 398 F.2d 651 (3rd Cir. 1968)

United States v. French, 429 F.2d 391 (9th Cir. 1970) 9

United States v. Joyce, 437 F. 2d 740 (7th Cir. 1971) 7

United States v. Newton, 435 F.2d 671 (9th Cir. 1970) 9

United States v. Rutherford, 437 F.2d 183 (8th Cir. 1971) 7

United States v. Seeger, 380 U.S. 163 (1965) 6

United States v. Tichenor, 403 F.2d 1986 (6th Cir. 1968) 9

United States v. Vlasits, 422 F.2d 1267 (4th Cir. 1970) 9

Welsh v. United States, 398 U.S. 333 (1970) 6

Zemke v. Larsen, 434 F.2d 1281 (9th Cir. 1970) 11

Statutes:

Public Law 92-129, §22(b)(4), September 28, 1971 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

MICHAEL EDWARD FRANCIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Michael Edward Francis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 14, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No written opinion was rendered by the District Court for District of Colorado.

JURISDICTION

The judgement of the Court of Appeal for the Tenth Circuit was entered on February 14, 1972. A timely petition for rehearing en banc was denied on May 10, 1972. On June 15, 1972, the Court of Appeals stayed the mandate until July 10, 1972, pending application for a writ of certiorari. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether a Selective Service Local Board may base its denial to a selective service registrant status as a conscientious objector on a mixture of legally erroneous and legally correct reasons.

STATEMENT OF THE CASE

On December 3, 1969, the petitioner filed a SSS Form 150 (application for conscientious objector status) with the Colorado Springs, Colorado, Selective Service Local Board No. 8. On March 3, 1970, the petitioner appeared before Local Board No. 8; on the same date, petitioner was refused I-O status and classified I-A. The Local Board submitted five reasons for denying to petitioner I-O status; two of the reasons are legally correct, three are erroneous as a matter of law. The stated reasons are:

1. Left Church. Religion is not thoroughly understood.
2. Appears insincere in his I-O request. Possibly coached.
3. Could help a wounded man, but wouldn't in battle.
4. Decision to fill out SSS 150 and apply for I-O status came after he fell behind academically.
5. Won't take military orders. Appeals that he is against taking any orders.

Mr. Francis timely appealed the Local Board decision to the Colorado State Appeal Board, which affirmed the Local Board decision. Mr. Francis was ordered to report for induction on July 1, 1970, but refused to report. On December 3, 1970, Mr. Francis was indicted; on April 23, 1971, he was convicted of failing to report for and

submit to induction in violation of 50 App., U.S.C. Section 462(a) and sentenced to the custody of the United States Attorney for a period of two years, twenty months of which would be spent in service of national importance.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THE RECENT DECISION OF THIS COURT IN CLAY v. UNITED STATES, 403 U.S. 698 (1971), AND WITH DECISIONS OF OTHER CIRCUIT ORDERS OF APPEAL.

a. The Decision Below Conflicts with Clay v. United States, 403 U. S. 698 (1971).

When a local board applies an erroneous standard of law or when the file contains evidence that an erroneous standard of law was applied and there is no evidence that the board disaffirmed or affirmatively decided not to use the erroneous standard, the resulting clasifcation decision is invalid. Clay v. United States, 403 U. S. 698 (1971); Sicurella v. United States, 348 U. S. 385 (1955).

Clay v. United States, supra, arose under the former procedure for selective service appeals, whereby the State Appeals Board referred appeals to the Department of Justice for advisory recommendations. In Clay, the Department

of Justice provided three reasons for its recommendation that classification as a conscientious objector be denied the registrant. 403 U. S. at 701-702. This Court held (and, in fact, the Solicitor General conceded) that two of the three reasons were legally erroneous. 403 U.S. at 703. Despite the fact that the third reason, upon which the Appeal Board may have relied, was found to be legally valid, this Court held the classification in question invalid and reversed the conviction based thereon. 403 U. S. at 703-704. This Court stated:

> Since the Appeal Board gave no reasons for its denial of the petioner's claim, there is absolutely no way of knowing upon which of the three grounds offered in the Department's letter it relied. Yet the Government now acknowledges that two of those grounds were not valid....
> This case, therefore, falls squarely within the four corners of this Court's decision in Sicurella v. United States, 348 U. S. 385, 75 S. Ct. 403, 99 L.Ed, 436. 403 U. S. at 703-704.

In Sicurella v. United States, supra, an erroneous standard of law had been applied by the Justice Department in evaluating a claim for conscientious objection. This Court held that absent some evidence in the registrant's file that the Appeal Board, to whom the Department's recommendation was purely advisory, ignored the standard propounded by the Department, the refusal of the

Board to classify the registrant I-0 was error.

In the case at bar, the Local Board stated five reasons for its denial to petitioner of classification as a conscientious objector. They are as follows:

1. Left Church. Religion is not thoroughly understood.
2. Appears insincere in his I-0 request. Possibly coached.
3. Could help a wounded man, but wouldn't in battle.
4. Decision to fill out SSS 150 and apply for I-0 status came after he fell behind academically.
5. Won't take military orders. Appeals that he is against taking any orders.

Of these five reasons, numbers 1, 3, and 5 are legally erroneous reasons for denial of I-0 status. "Leaving Church" cannot be a basis for denial of I-0 status. So-called "private" religions, or religions not characterized by formal attendance of church, have been given equal dignity with more conventional forms of worship at least since United States v. Seeger, 380 U.S. 163 (1965). More recently, this Court, in Welsh v. United States, 398 U. S. 333 (1970), expanded the basis for I-0 status to include beliefs purely ethical or moral in source and content, and irreligious in a conventional sense. Neither of these cases have ever

required formal church attendance as a prerequisite for I-O status nor have they considered formal church attendance indicative, one way or another, of a registrant's conscientious opposition to war.

Reasons number 3 and 5 ("wouldn't help a wounded man in battle" and "won't take military orders") are likewise erroneous bases for denial of I-O status. Items number 3 and 5 demonstrate the Local Board's confusion between I-O and I-A-O status. Although the statute provides the same test for both I-O (objector to all military service) and I-A-O (objector to combatant service only)---opposition to participation in war in any form---the point of distinction between the two beliefs is the degree to which the registrant feels that service in a non-combatant capacity, such as medical corpsmen, infringes upon his beliefs.

Finally, a number of courts have considered the question of whether negative inferences can be drawn from the fact that a registrant obtained deferments other than that as conscientious objector and/or filed a conscientious objector application contemporaneously with the expiration of a II-S (student) or other deferment, and held that the timing of such an application cannot provide a basis in fact to sustain a conviction. United States v. Rutherford, 437 F.2nd 183 (8th Cir. 1971); United States v. Joyce, 437 F.2d 740 (7th Cir. 1971); Bohnert v. Faulkner, 438 F.2d 747 (6th Cir. 1971); United States v. White, 421 F.2d 487 (5th Cir. 1969); United States v. Broyles, 423 F.2d 1299

4th Cir. 1970); Capobianco v. Laird, 424 F.2d 1304 (2d Cir. 1970); Bates v. Commander, 413 F.2d 475 (1st Cir. 1969).

The foregoing errors of law bring this case well within the rule of Clay and Sicurella. In fact, the facts in this case present even more compelling reasons for applying the erroneous standard of law rule than the facts in Clay and Sicurella. In both Clay and Sicurella the Department of Justice's erroneous recommendation was advisory only; the decision was rendered by the appeal board. In the case at bar, the erroneous standard of law was articulated and exercised not by an advisory board but by a local board exercising direct control over the decision to grant or deny I-O status to petitioner. In these circumstances, the consequences of legal error are both more direct and prejudicial.

The fact that the Local Board's reason number 2 ("Appears insincere in his I-O request. Possibly coached.") is not, on its face, legally erroneous, does not take the case at bar beyond the rule of Clay and Sicurella. There was no evidence in Clay or Sicurella that the board actually relied upon an erroneous standard of law. This Court in Clay and Sicurella explicitly acknowledged that the appeal board might, in fact, have relied upon legally correct reasons for denying registrant's claim. Nonetheless, this Court reversed the registrant's convictions because of the possibility that the Board relied upon an erroneous legal ground.

> [W]e feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied upon some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. 348 U.S. at 392 [Emphasis added.]

b. The Decision Below Conflicts with Other Circuit Courts of Appeal.

The Second, Third, Fourth, Fifth, Sixth, and Ninth Circuit Courts of Appeal have held, contrary to the Tenth Circuit's decision below, that when a selective service file contains evidence that an erroneous standard of law was applied and there is no evidence that the Board disaffirmed the erroneous standard, the resulting classification decision is invalid. United States v. French, 429 F.2d 391 (9th Cir. 1970); United States v. Newton, 435 F.2d 671 (9th Cir. 1970); Zemke v. Larsen, 434 F.2d 1281 (9th Cir. 1970); United States v. Vlasits, 422 F.2d 1267 (4th Cir. 1970); United States v. Carroll, 398 F.2d 651 (3rd Cir. 1968); United States v. Tichenor, 403 F. 2d 986 (6th Cir. 1968); Robertson v. United States, 404 F.2d 1141 (5th Cir. 1968)

In United States v. French, supra, the Ninth Circuit was faced with a Justice Department recommendation to the Appeal Board that, first, the registrant's objections to war were not based on "religious training and belief," and second, "that the registrant is not sincere in his claim." In reversing the conviction, the Court stated the law in the Ninth Circuit as follows:

> Because the Appeal Board stated no reason for its decision, we must reverse if one reason given by the Department of Justice for sustaining French's I-A classification is erroneous, either because it is legally incorrect or because it is not supported by any basis in fact. The reason is that we cannot tell whether or not the Appeal Board relied upon the erroneous ground. 429 F.2d at 392.

In United States v. Newton, supra, the Ninth Circuit applied the same standard, stating:

> Under the holding of this Court in United States v. French, 429 F.2d 391 (9th Cir. 1970), if the recommendation for classification from the Justice Department to the Board contains even one impermissible ground upon which the Board may have relied, the classification is without basis in fact. 435 F.2d at 674.

And, finally, in Zemke v. Larsen, supra, the Ninth Circuit reversed and remanded for further consideration a denial of conscientious objector status by an army board to an in-service claimant, stating:

> At best the Board has asserted two reasons for disapproval without affording us assurance that the impermissible one was not controlling. Since we cannot determine whether or not the Army Board relied upon an illegal classification standard, we cannot determine whether appellant's in-service C-O application was properly denied. 434 F.2d at 1283.

In United States v. Vlasits, supra, the Fourth Circuit reversed a conviction where the local board clerk had made the following notation in the defendant's file following his personal appearance:

> Attending school U of NC was considered for defer to finish has not religious claim now has been in early teens Lutheran then switched to Congregational not practicing now believes that its not human to take arms supplied letters to confirm his belief.

On these facts, the Fourth Circuit concluded that:

> Since Vlasits' classification resulted from the board's erroneous interpretation of the statute granting

> the exemption, the government is precluded from urging affirmance on other grounds. 422 F.2d at 1269.

Petitioner submits that in the instant case the Local Board's erroneous intepretation of the law is even more apparent than that found in Vlasits. In the case at bar, the Board followed its record of its vote by five statements, of which three are impermissible standards for judging conscientious objector claims. Since we cannot evaluate what decision the Board would have reached absent the weight attached to these impermissible considerations, the classification must be declared invalid.

c. The Local Board's Classification Was Based on Five Recorded Reasons, of Which Three are Legally Erroneous.

After petitioner appeared for his personal appearance, his Local Board drafted a memorandum summarizing the content of that interview and rendering its decision. The final entries in the memorandum read as follows:

> Summary and Decision of the Board
> I-A Vote 4 to 0
> 1. Left Church. Religion is not thoroughly understood.
> 2. Appears insincere in his I-0 request. Possibly coached.
> 3. Could help a wounded man, but wouldn't in battle.

4. Decision to fill out SSS 150 and apply for I-0 status came after he fell behind academically.
5. Won't take military orders. Appeals that he is against taking any orders.

This memorandum was signed by the Chairman of the Local Board.

These entries indicate the Local Board's reasons for reaching its decision. In fact, in her testimony before the trial court, the clerk of the Local Board specifically stated that Items 1 through 5 reflected the Board's reasons for its denial of petitioner's claim. T. p. 12. It follows that the Board's classification rested, or may have rested, on erroneous legal standards, and hence is invalid. The Court below failed to pass on this issue by concluding that, "This summary is a mixture of facts and conclusions, none of which constitute 'reasons' in the sense of United States v. Andrews, 446 F.2d 1086 (10th Cir. 1971)...." Slip Opinion, p. 3. However, whether one regards the five entries made by the Local Board as a "summary" or as "reasons," there is no doubt that they indicate considerable misunderstanding on the part of the Local Board as to the standard of law applicable to registrant's applying for conscientious objector status.

II. UNDER PUBLIC LAW 92-129, §22(b)(4), SEPTEMBER 28, 1971, THE

ISSUE OF THE PROPRIETY OF REASONS GIVEN BY LOCAL BOARDS TO JUSTIFY THEIR ACTIONS IS LIKELY TO ARISE FREQUENTLY.

Public Law 92-129, §22(b)(4) states that selective service boards are required to furnish the registrant, upon his request, "...a brief written statement of the reasons for its decision," when adverse to the registrant's claim. Prior to this statute, there was no such statutory requirement; however, most circuits had already instituted similar requirements. United States v. Andrews, 446 F.2d 1086 (10th Cir. 1971).

In view of this new statutory requirement, it is apparent that cases involving questionable reasons given by local boards will soon multiply. In view of this development, this Court should consider the standards to which such reasons will be held for the guidance of the lower federal courts and the selective service system. This is especially true in light of the fact that both of the leading cases on the erroneous standard of law issue, Clay v. United States, supra, and Sicurella v. United States, supra, arose under the former procedure whereby the Department of Justice rendered advisory opinions to State Boards of Appeal.

While it would be unwise to expect that Local Board Statements pursuant to Public Law 92-129, §22(b)(4) would have the formality of legal opinions, they must still state legally valid reasons founded on a basis in fact.

The requirements of the statute, however, leave unanswered many questions regarding the minimum standards for the content of such statements, and the mode of their interpretation. This case is an appropriate one for the Court to reach these issues.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted

RUDOLPH SCHWARE
5701 East Evans Avenue
Denver, Colorado 80222
(303) 757-5641

Of Counsel:

GUY T. SAPERSTEIN
2201 Fruitvale Avenue
Oakland, California 94601
(415) 532-6645

Certificate of Service

I hereby certify that on this 6th day of July, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530.

Guy T. Saperstein
2201 Fruitvale Avenue
Oakland, California 94601
(415) 532-6645

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 71-1294 - JANUARY 1972 TERM

UNITED STATES OF AMERICA, Appellee, v. MICHAEL EDWARD FRANCIS, Appellant.	Appeal From The United States District Court For the District of Colorado (D. C. # 70-CR-296)

John Kuenhold, Alamosa, Colorado (Guy T. Saperstein, Boulder, Colorado, with him on the Brief), for Appellant.

William K. Hickey, Assistant United States Attorney (James L. Treece, United States Attorney, with him on the Brief), for Appellee.

Before HILL, SETH, and HOLLOWAY, Circuit Judges.

PER CURIAM.

This is a direct appeal from a conviction for failing to report for induction in violation of 50 U.S.C. App. § 462(a).

On the expiration date of his II-S deferment, the appellant requested a I-S (c) classification, hoping to extend his deferment until completion of his teacher training at Colorado State College. As he had not yet received an order to report for induction, he was declared ineligible and subsequently classified I-A on November 5, 1969. On the same day Mr. Francis requested conscientious objector form 150. His file and completed form 150 were reviewed during his personal appearance on March 3, 1970, and that evening he was reclassified I-A. Appeal to the Colorado State Appeal Board resulted in the denial of conscientious objector status, and this board classified him as I-A. The appellant was ordered to report for induction on July 8, 1970. On July 7, 1970, Mr. Francis wrote to his local board, explaining that he would not be present for induction "due to religious beliefs."

The local board entered a summary of the personal interview of appellant, and of its review of his form 150. This summary is a mixture of facts and conclusions, none of which constitute "reasons" in the sense of United States v. Andrews, 446 F.2d 1086 (10th Cir.), which was decided after the local board's action here. The summary however

clearly indicates that the board found appellant was not sincere in his beliefs.

As mentioned, the appellant appealed to the state board which in the required de novo proceedings classified him as I-A, and on this classification he was ordered to report. The state board gave no reasons for its classification.

Under Public Law 92-129, §22(b)(4), September 28, 1971, the selective service boards are required to furnish the registrant, upon his request," . . . a brief written statement of the reasons for its decision," when adverse to registrant's claim. This provision came after most appellate courts had made similar requirements. The board action in the case before us arose before the effective date of the statute, and before our decision in United States v. Andrews, 446 F.2d 1086, and thus is not controlled thereby.

It is apparent in conscientious objector cases, as indicated in United States v. Andrews, how useful on judicial review it is to have an indication by the board whether it found the registrant sincere in his beliefs. In the case before us we have such an indication by the local board, and this is sufficient to guide us on this appeal.

A careful review of the record demonstrates that there is a basis in fact for appellant's classification under the prevailing authorities. It is not necessary to again review the limited nature of our review under the circumstances presented in this case.

AFFIRMED.